No. 13-20-00355-CV

In the Court of Appeals for the Thirteenth Judicial District of Texas Edinburg Division

HIDALGO COUNTY WATER IMPROVEMENT DIST. NO. 3,
Appellant,

v.

HIDALGO COUNTY WATER IRRIGATION DIST. NO. 1,
Appellee.

ON APPEAL FROM THE COUNTY COURT-AT-LAW NO. 4,
HIDALGO COUNTY, TEXAS, THE HONORABLE FRED GARZA, JR., PRESIDING

APPELLANT'S BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE

This is a condemnation case involving a contested easement and the issue of governmental immunity. Appellant Hidalgo County Water Improvement District No. 3 ("District 3") seeks to condemn an easement crossing property owned by Hidalgo County Irrigation District No. 1 ("District 1") in the City of McAllen, Texas. CR6. The court-appointed Special Commissioners awarded just compensation to District 1, which District 3 paid into the registry of the court. CR47, 63, 83. As a result, District 3 was entitled under the Property Code to immediate possession of the contested easement pending the results of the litigation. TEX. PROP. CODE § 21.021(a). In response, District 1 filed an answer and objections to the award, followed by a plea to the jurisdiction asserting governmental immunity. CR88, 103. In turn, District 3 filed a motion for writ of possession. CR106. Before hearing the motion for writ of possession but following a hearing on District 1's plea to the jurisdiction, RR Vol. 2, the trial court granted the plea and dismissed the condemnation case, resulting in a final judgment ("the Order of Dismissal"). CR180 (Appendix). District 3 then filed this appeal, CR182, following which it filed a post-judgment Notice of Temporary Suspension of Order of Dismissal and Emergency Motion for Immediate Temporary Possession of Easement Pending Appeal. CR194. Citing lack of jurisdiction, the trial court refused to rule on the motion. *See* Exhibit

A-9 to Appellant's Emergency Motion for Temporary Orders (email from the trial court).

STATEMENT REGARDING ORAL ARGUMENT

Oral argument will aid the decisional process. The issue of governmental immunity presented in this appeal is vitally important to the jurisprudence of the state. Despite supreme court authority to the contrary, the trial court has ruled that governmental immunity applies in condemnation suits, categorically placing real property owned by one governmental entity beyond the reach of the condemnation authority of another. This conflicts with two legal principles: (1) condemnation proceedings are *in rem* proceedings, and (2) governmental entities are not entitled to immunity in suits that are *in rem*.

Were this Court to affirm the Order of Dismissal, it would be only the second lower appellate court in Texas to squarely hold that governmental immunity applies to condemnation suits, the first one having been reversed on other grounds by the supreme court. *Dallas Area Rapid Transit v. Oncor Elec. Delivery Co., LLC,* 331 S.W.3d 91 (Tex. App.—Dallas 2010) *rev'd on other grounds* 369 S.W.3d 845, 849 (Tex. 2012). The court of appeals in *Oncor* said "we cannot conclude, <u>without guidance from the legislature or supreme court</u>, that condemnation actions such as the one at issue do not implicate governmental immunity." 331 S.W.3d at 99 (emphasis added). Reversing the court of appeals, the supreme court expressly

avoided the threshold question of whether immunity applies to eminent domain cases and went straight instead to the question of whether any immunity in that case had been waived by legislation, holding that it had. 369 S.W.3d at 849-50. In its recent *City of Conroe* opinion, however, the supreme court has now provided the very guidance sought by the court of appeals in *Oncor*. *City of Conroe v. San Jacinto River Auth.,* 602 S.W.3d 444, 457-58 (Tex. 2020). While not a condemnation case, *City of Conroe* holds that governmental immunity does not apply to an *in rem* proceeding. The supreme court, therefore, has rejected the reasoning of the court of appeals in *Oncor*.

ISSUES PRESENTED

Issue 1. In Texas, condemnation actions are proceedings *in rem*. *E.g. City of Blue Mound v. Sw. Water Co.*, 449 S.W.3d 678, 683 (Tex. App.—Fort Worth 2014, no pet.) (citing *Reeves v. City of Dallas,* 195 S.W.2d 575, 581 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.)). In turn, the Texas Supreme Court has recently held that governmental immunity does not apply to *in rem* proceedings. *City of Conroe v. San Jacinto River Auth.,* 602 S.W.3d 444, 457-58 (Tex. 2020) (suit brought under the Expedited Declaratory Judgment Act). The trial court nevertheless ruled that District 1 enjoys governmental immunity in District 3's *in rem* condemnation proceeding. Did the trial court err?

Issue 2. In Texas, the Legislature determines when immunity is waived, provided the waiver is clear and unambiguous. The courts have therefore repeatedly held that immunity is waived when the Legislature allows the use of eminent domain to acquire public property." *E.g State v. Montgomery Co*., 262 S.W.3d 439, 443 (Tex. App.—Beaumont 2008, no pet.). In Chapter 49 of the Water Code, the Legislature has provided that "[a] district or water supply corporation may acquire by condemnation ***any land***, easements, or other property … necessary for water, sanitary sewer, storm drainage, or flood drainage or control purposes or for any other of its projects or purposes …." TEX. WATER CODE § 49.222(a) (emphasis added). Assuming, for purposes of argument only, that governmental immunity might otherwise apply to condemnations, which District 3 disputes, did the trial court err in refusing to find a waiver of immunity?

STATEMENT OF FACTS

A. The Contested Easement

The underlying eminent domain proceeding relates to the extension of District 3's raw water pipeline ("the Pipeline") currently being constructed in conjunction with the extension of Bicentennial Boulevard ("Bicentennial") in the City of McAllen, Texas ("the City"). CR217 (affidavit of Frank Ferris, P.E., the engineer for District 3).[1] In August 2019, the City granted District 3 an easement for the Pipeline to be installed within the public right-of-way of Bicentennial (CR226), and the City and District 3 executed an interlocal agreement governing construction of the Pipeline in that same public right-of-way. CR235.[2] In short order, District 3 secured a crossing agreement from Hidalgo County Irrigation District No. 2, an affected landowner along the Pipeline's route. The only other affected landowner along the route is District 1.[3]

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[1] The construction of both the Pipeline and Bicentennial Boulevard began in January 2020 pursuant to an *Interlocal Cooperation Agreement* between District 3 and the City and a construction contract between the City and its contractor, Texas Cordia Construction ("Concordia"). Over the last eight months, Concordia has installed approximately 3,100 feet of the Pipeline. To date, District 3 has spent more than $1,000,000 on this project. Concordia will soon have installed the Pipeline to a location at which it would begin crossing under District 1's canal right-of-way using the subsurface easement which is the subject of this condemnation proceeding. *See* CR217.

[2] In addition to its right to construct the Pipeline pursuant to the easement and interlocal agreement with the City, District 3 has a statutory right to install the Pipeline in the public right-of-way of Bicentennial under Section 49.220 of the Texas Water Code.

[3] The design and plans for the Pipeline would cross District 1's canal right-of-way and require a boring under siphons connecting the east and west segments of an open canal. CR220. It would cross in a 66-inch steel casing buried at a depth of not less than fifteen feet below the surface and beneath District 1's main canal and siphons using a boring and installation method commonplace in pipeline construction. *See* CR217.

Seeking a crossing permit, District 3 shared the Pipeline construction plans with District 1. CR220. District 3's engineer also met with District 1's engineer to discuss the requested easement. CR220. While District 1's engineer left the impression that the Pipeline design was satisfactory and would not adversely impact District 1's infrastructure, District 1 refused to issue a permit. CR220. In November 2019, therefore, District 3 was forced to file the underlying eminent domain proceeding, seeking a 0.05-acre subsurface-only easement located within the public right-of-way of Bicentennial and the right-of-way of District 1's canal ("the contested easement"). CR6.

B. Procedural History

The trial court appointed Special Commissioners to assess the damages associated with the acquisition of the contested easement. CR16. The Commissioners awarded District 1 $1,900.00 as just compensation for the contested easement rights. CR47. District 3 promptly tendered the amount of the award into the registry of the trial court and satisfied all statutory requirements necessary to be entitled to immediate possession of the contested easement pending the outcome of the litigation. CR63. District 1 filed an answer and objections to the award, as well

as a plea to the jurisdiction. CR88, 103. Instead of granting District 3 possession, the trial court dismissed the case for want of jurisdiction. CR180.[4]

SUMMARY OF THE ARGUMENT

In Texas, condemnation actions are proceedings *in rem*. In turn, the Texas Supreme Court has recently held that governmental immunity does not apply to *in rem* proceedings. Therefore, governmental immunity does not apply in condemnation suits.

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[4]In addition to challenging District 3's use of its eminent domain power, District 1 has taken extra-judicial steps to circumvent that power and to undermine District 3's right to extend its irrigation water distribution system. Almost a year after District 3 secured its own easement from the City, and the concomitant interlocal agreement, District 1 and the City executed an "Easement in Gross Agreement" (the "Agreement"), under which District 1 conveyed an easement to the City to cross District 1's property in constructing the extension of Bicentennial. The Agreement contains provisions that have – or will have - the effect of interfering with District 3's right to install the Pipeline in the public right-of-way of Bicentennial - provisions that are contrary to public policy and therefore void. **First**, the practical effect of the Agreement is to relocate the easternmost boundary of the Bicentennial right-of-way so that both District 3's easement from the City and the contested easement are no longer within the public right-of-way. CR222. **Second,** the Agreement contains restrictions on the use of the public's right-of-way, the effect of which essentially prevents installation of the Pipeline. For example, the Agreement prohibits "installation of any pipeline or any underground facility on, in or under [District 1's] siphon," and further provides that if the City "installs or allows the installation of any pipeline or underground infrastructure on, in or under [District 1's] siphon, the Easement granted here [*i.e.*, the Bicentennial right-of-way] is immediately extinguished and thereafter null and void *ab initio*." CR243. This not only would effectively close the Bicentennial roadway but also targets the Pipeline and District 3's right, just like any other utility, to install utility infrastructure in a public right-of-way. It also targets District 3's contractual right with the City, which was already in effect at the time the Agreement was executed, to construct the Pipeline in the Bicentennial right-of-way. **Third,** the Agreement provides that the easement and related rights are an "exclusive easement in gross for the benefit of City." CR244. Again, this can be nothing other than an attempt to deprive any other party, including District 3, of their common law and statutory rights to install utilities and other facilities in the public right-of-way of the roadway in the vicinity of the contested easement. This court has previously held restrictions like these to be void as against public policy. *Harlingen Irrigation District Cameron County No. 1 v. Caprock Communications Corp.*, 49 S.W.3d 520, 532 (Tex. App.—Corpus Christi 2001, pet. denied).

Assuming, for purposes of argument only, that governmental immunity otherwise extends to condemnation actions, which District 3 disputes, the Legislature has waived immunity under Chapter 49 of the Water Code. The trial court therefore erred in ruling that District 1 enjoys governmental immunity in District 3's *in rem* condemnation proceeding.

In either event, the trial court erred in granting District 1's plea to the jurisdiction. Therefore, this cause should be remanded for a trial on the merits.

ARGUMENT

I. District 1 does not have Governmental Immunity

A. Standard of Review

The trial court's ruling on a plea to the jurisdiction asserting governmental immunity is reviewed *de novo* on appeal. *City of Conroe*, 602 S.W.3d at 457. "Although the Legislature determines when immunity is waived, 'the judiciary has historically been, and is now, entrusted with defining the boundaries of [governmental immunity] and determining under what circumstances ... immunity exists in the first instance.'" *Id.* (quoting *Wasson Interests, Ltd. v. City of Jacksonville*, 489 S.W.3d 427, 432 (Tex. 2016)).

B. Governmental Immunity does not Apply in Condemnation Proceedings (Issue 1)

1. Condemnation actions are proceedings *in rem*

Texas follows the ancient and prevailing rule that condemnation actions are proceedings *in rem*. *City of Blue Mound v. Sw. Water Co.*, 449 S.W.3d 678, 683 (Tex. App.—Fort Worth 2014, no pet.) (citing *Reeves v. City of Dallas*, 195 S.W.2d 575, 581 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.)). District 1 does not appear to challenge the rule. Indeed, it has been the prevailing rule in the United States since at least 1892. *United States v. Petty Motor Co.*, 66 S.Ct. 596, 599 (1946) (citing *United States v. Dunnington*, 13 S.Ct. 79, 82-84 (1892)).

2. Governmental immunity does not apply to *in rem* proceedings

An *in rem* proceeding, such as a condemnation case, is an action "instituted directly against a thing, …taken directly against property, or … brought to enforce a right in the thing itself." *City of Conroe*, 602 S.W.3d at 457-58 (quoting *Bodine v. Webb*, 992 S.W.2d 672, 676 (Tex. App.—Austin 1999, pet. denied). "The general rule of *in rem* jurisdiction is that the court's jurisdiction is dependent on the court's control over the defendant *res*." *Id.* at 458 (quoting *Costello v. State*, 774 S.W.2d 722, 723 (Tex. App.—Corpus Christi 1989, writ denied)). An *in rem* action "affects the interests of all persons in the world in the thing," but an *in rem* judgment's effect

is limited only "to the property that supports jurisdiction." *Id.* at 458 (quoting *Bodine*, 992 S.W.2d at 676).

Governmental immunity, on the other hand, is meant to "shield[] the State and its political subdivisions 'from the costs and consequences of improvident actions of their governments.'" *City of Conroe*, 602 S.W.3d at 458 (quoting *City of Galveston v. State*, 217 S.W.3d 466, 472 (Tex. 2007)). "A lack of immunity may hamper governmental functions by requiring tax resources to be used for defending lawsuits and paying judgments rather than using those resources for their intended purposes." *Id.* (quoting *Reata Constr. Corp. v. City of Dallas*, 197 S.W.3d 371, 375 (Tex. 2006)).

Contrasting the purpose of governmental immunity with the nature of *in rem* proceedings, the Texas Supreme Court recently held that governmental immunity does not apply in actions for declaratory relief brought under the Expedited Declaratory Judgment Act ("EDJA") because such actions are *in rem* proceedings. *City of Conroe*, 602 S.W.3d at 458 (examining the policies underpinning governmental immunity and holding that "suits under the EDJA do not implicate the policies that underpin our immunity jurisprudence.").

3. The same reasoning applies in condemnation actions

As of 2016, the Texas Supreme Court had never specifically addressed whether governmental immunity applies in condemnation proceedings. *In re Lazy*

W Dist. No. 1, 493 S.W.3d 538, 544 & n. 46 (Tex. 2016) ("We have never decided whether a governmental entity is immune from suit to condemn its property.")

The reasoning applied in 2020 by the *City of Conroe* court to suits under the EDJA, however, applies equally to condemnation suits. *City of Conroe* was decided four years after the Court's observation in *Lazy W* that it had never decided the issue. 493 S.W.3d at 544. Like actions for declaratory relief under the EDJA, condemnation actions are proceedings *in rem*. *E.g. City of Blue Mound,* 449 S.W.3d at 683. Like bond-issuing governmental entities under the EDJA, governmental condemnees are not required to use taxpayer funds to pay judgments for damages or attorney's fees. Therefore, governmental immunity does not apply in condemnation proceedings, which "do not implicate the policies that underpin our immunity jurisprudence." *City of Conroe,* 602 S.W.3d at 458.

District 1 argued below that *City of Conroe* is limited to actions for declaratory relief under the EDJA because (1) while there is no risk that a governmental condemnee will be required to pay a judgment, the government must still use taxpayer funds to pay the cost of defending the condemnation, and (2) unlike a bond-issuing governmental entity under the EDJA, whose joinder as a party is not required, governmental condemnees must be joined.

District 1's argument is identical to the reasoning previously relied upon by the Dallas Court in *Oncor* as the basis for holding that governmental immunity

applies to eminent domain actions despite the *in rem* nature of those proceedings. In *Oncor*, however, the lower appeals court noted that "we cannot conclude, without guidance from the legislature or supreme court, that condemnation actions such as the one at issue do not implicate governmental immunity." 331 S.W.3d at 99 (emphasis added). The supreme court then reversed the lower court's decision on other grounds (waiver of immunity) and did not respond to the invitation for guidance. In its recent decision in *City of Conroe*, however, the supreme court has provided that very guidance and implicitly rejected the Dallas Court's earlier reasoning in *Oncor*, as well as District 1's argument in this case, with respect to *in rem* proceedings. 602 S.W.3d at 458.

The supreme court in *City of Conroe* nowhere expressly limited its holding to suits under the EDJA. To the contrary, as the court explained: "We agree with the Attorney General and the SJRA that because EDJA suits concern only *in rem* rights, immunity does not apply." 602 S.W.3d at 458. And just like suits brought under the EDJA, condemnation suits "concern only *in rem* rights."

Furthermore, if governmental entities enjoyed immunity in condemnation proceedings, the age-old "paramount purpose" test would make no sense. As the supreme court explained in *Canyon Reg'l Water Auth. v. Guadalupe-Blanco River Auth.*, 258 S.W.3d 613 (Tex. 2008):

> We have long held that condemnees may prevent a condemnation when the property is already devoted to another public use and the condemnee

> establishes that the new condemnation "would practically destroy the use to which it has been devoted." In *Sabine* one railroad company sought to condemn a right-of-way across another railroad's yard so that it could connect to a third railroad's existing lines. The question presented was whether the first railroad could exercise its eminent domain power to condemn property already devoted to public use. We held that if the condemnee can show that the condemnation would practically destroy the existing use, then to succeed with the condemnation the condemnor must show that "the necessity be so great as to make the new enterprise of paramount importance to the public, and it cannot be practically accomplished in any other way." Lower courts remain unsettled regarding what proof is necessary to satisfy the practical destruction standard and invoke the paramount purpose test. We have indicated that the standard may be met when "the second use to which the property is sought to be put will destroy, or, at least, materially interfere with, that to which such property has been previously devoted." The River Authority must show that the Water Authority's proposed condemnation will practically destroy or at least materially interfere with the existing public use of Lake Dunlap to force the Water Authority to demonstrate that its purpose for condemnation is of paramount importance and cannot be practically accomplished in any other way.

Id. at 617 (citations omitted). If governmental condemnees enjoyed governmental immunity, there would be no need for the "paramount purpose" test; paramount purpose would never come into play because the condemnor's proposed competing use would be irrelevant – no condemnation, no need to balance anything.

Finally, granting governmental immunity in condemnation suits would hobble future public uses by introducing a random and fortuitous factor into the exercise of eminent domain. Whether entities with uncontested eminent domain authority could ever condemn property clearly necessary for an undisputed public use would depend entirely on whether the property was already owned by another governmental entity.

If so, an otherwise justifiable condemnation would be dead in its tracks. Any government project for roads, streets, water lines or other public works would be subject to the whim of any other government entity along the route and could only be accomplished with their consent. The power of eminent domain would be rendered meaningless no matter the merit or necessity of the project. This is not the law. *E.g. Humble Pipe Line Co. v. State*, 2 S.W.2d 1018, 1019 (Tex. App.—Austin 1928, writ ref'd) (finding the implied power to condemn state owned land where it was necessary to fulfill the express purposes for which the condemning entity was created). *See also* 26 AM. JUR. 2D Eminent Domain § 108 ("When the legislature authorizes the laying out of such public works as railroads, canals, and highways, since it is usually impossible in an inhabited country to lay out such works without crossing other public projects, authority to establish such crossings will be inferred."); 1A NICHOLS ON EMINENT DOMAIN § 2.17[1], at 2-72.

Given the absence of governmental immunity in condemnation suits, this Court should reverse the trial court's Order of Dismissal and remand the cause for a trial on the merits.

C. Governmental Immunity for Condemnations under Chapter 49 of the Water Code has been Waived (Issue 2)

Assuming, solely for purposes of argument, that governmental immunity otherwise applies in condemnation suits, which District 3 disputes, the Legislature

has nevertheless consented to suit through legislative waiver of that immunity in condemnation actions under Chapter 49 of the Water Code.

1. Standard for legislative consent

A legislative waiver of immunity must be expressed in "clear and unambiguous language." *City of New Braunfels v. Carowest Land, Ltd.*, 432 S.W.3d 512-513 (Tex. App.—Austin 2014, no pet.). "The clear and unambiguous requirement is not an end in itself, but merely a method to guarantee that courts adhere to legislative intent." *Kerrville State Hosp. v. Fernandez*, 28 S.W.3d 1, 3 (Tex. 2000). The doctrine is not applied mechanically to defeat the true purpose of the law. *Id.* Stated another way:

> The rule requiring a waiver of governmental immunity to be clear and unambiguous cannot be applied so rigidly that the almost certain intent of the Legislature is disregarded. Legislative intent remains the polestar of statutory construction. [Courts] will not read statutory language to be pointless if it is reasonably susceptible of another construction. If a statute leaves no reasonable doubt of its purpose, [courts] will not require perfect clarity, even in determining whether governmental immunity has been waived.

Id. As such, a statute is not required to go so far as to state "immunity is waived," to satisfy the clear and unambiguous standard. *City of La Porte v. Barfield*, 898 S.W.2d 288, 291-292 (Tex. 1995), *superseded by statute as stated in Manbeck v. Austin Indep. Sch. Dist.*, 381 S.W.3d 528, 532 (Tex. 2012). In the condemnation context, courts have repeatedly held that immunity has been waived when the law allows for

the use of eminent domain to acquire public property. *State v. Montgomery Co.*, 262 S.W.3d 439, 443 (Tex. App.—Beaumont 2008, no pet.); *Oncor*, 369 S.W.3d at 849.

2. Section 49.222 of the Water Code expressly waives immunity

Chapters 49 and 51 of the Texas Water Code set out the powers and authorities granted to water control and improvement districts, like District 3.[5] Chapter 49 provides the rules applicable to all water districts, and Chapter 51 provides the specific provisions applicable to water control and improvement districts. *See* TEX. WATER CODE §§ 49.002, 51.001, 51.121. As it relates to the power of eminent domain, Section 49.222(a) provides as follows:

> A district or water supply corporation may acquire by condemnation ***any land***, easements, or other property inside or outside the district boundaries, or the boundaries of the certificated service area for a water supply corporation, necessary for water, sanitary sewer, storm drainage, or flood drainage or control purposes or for any other of its projects or purposes ….

Id. (emphasis added).

In *Burlington N. & Santa Fe Ry. Co. v. City of Houston*, a case with substantially similar facts to those at issue here, the court of appeals held that the right to condemn "any land" included the right to condemn public land. 171 S.W.3d 240, 249–50 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (analyzing the statutes

[5] District 3 was originally created as a water improvement district in 1921 and was subsequently converted to a water control and improvement district in 1926. CR208, 215.

granting railroads the power of eminent domain, none of which expressly stated railroads could condemn public land and holding that "the legislature has specifically authorized a railroad corporation to condemn 'any real estate'… including on public lands.") (citing *Texas Turnpike Authority v. Shepperd*, 279 S.W.2d 302, 361 (Tex. 1955)).

By using the term "any land," Section 49.222 clearly and unambiguously provides the power to condemn public property. That is because words used in statutes are not given some alien construction, but their ordinary meaning. TEX. GOV'T CODE § 312.002; *Taylor v. Firemen's and Policemen's Civil Service Comm'n*, 616 S.W.2d 187, 189 (Tex. 1981).

In examining the usage of the term "any" in construing statutes, Black's Law Dictionary has defined the term to be equivalent to, and to have the force of "every" and "all." *Any*, BLACK'S LAW DICTIONARY (6th Ed., 1991). Texas courts asked to determine the meaning of the word "any" as used in statutes and contractual documents have given the term the same expansive meaning. *Hime v. City of Galveston*, 268 S.W.2d 543, 545 (Tex. App.—Waco 1954, writ ref'd n.r.e.) ("[T]he word 'any' has been judicially construed to mean: 'each' or 'every' or 'all;' and particularly in construing statutes, the word 'any' is equivalent to and has the force of 'every' and 'all.'"); *Branham v. Minear*, 199 S.W.2d 841, 846 (Tex. App.—Eastland 1947, writ ref'd n.r.e.) ("[M]any cases are collated showing that in

construing statutes and other instruments 'any' is equivalent to and has force of 'every' or 'all'…. We think that as found by the learned trial court, 'any minerals' as used in the deed in question, undoubtedly meant 'all minerals.'"); *Doherty v. King*, 183 S.W.2d 1004, 1007 (Tex. App.—Amarillo 1944, writ dism'd) ("When the word 'any' is used in a plural sense it means 'all,' 'all or every,' 'each,' 'each one of all,' or 'every' without limitation."); *Texas Co. v. Schriewer*, 38 S.W.2d 141, 144–45 (Tex. App—Waco 1931); *aff'd in part, rev'd in part sub nom, Smith v. Tex. Co.* 53 S.W.2d 774 (Tex. Comm'n App. 1932) ("In its broad, distributive sense, the sense in which the word is very frequently used, it may have the meaning of 'all,' 'every,' 'each,' or 'each one of all.'").

Properly construed, the phrase "any land" as used in section 49.222 means "all land," both public and private. Because section 49.222 allows for the condemnation of public land, it constitutes a clear and unambiguous waiver of immunity, *Montgomery Co.*, 262 S.W.3d at 443, assuming such immunity exists at all (which it does not). *City of Conroe*, 602 S.W.3d at 457-58.

This construction is not only consistent with the rules of statutory construction, but also long-standing principles of Texas law that allow for: (a) multiple public projects to coexist in the same area where those projects are compatible with one another, *see generally Canyon Reg'l Water Auth.*, 258 S.W.3d at 613; TEX. WATER CODE §§ 49.220, 49.223; TEX. UTIL. CODE § 181.005, and (b)

broadly construing grants of eminent domain authority to ensure the purposes for which the condemning entity was created can be accomplished. *See Humble Pipe Line Co. v. State*, 2 S.W.2d 1018, 1019 (Tex. App.—Austin 1928, writ ref'd) (finding the implied power to condemn state owned land where it was necessary to fulfill the express purposes for which the condemning entity was created); 26 AM. JUR. 2D Eminent Domain § 108 ("When the legislature authorizing the laying out of such public works as railroads, canals, and highways, since it is usually impossible in an inhabited country to lay out such works without crossing other public projects, authority to establish such crossings will be inferred.").

It is also consistent with reality. In the real world, entities constructing public utility projects in inhabited areas, like the Pipeline at issue here, undoubtedly encounter areas where they must cross publicly owned land. *See* 1A NICHOLS ON EMINENT DOMAIN § 2.17[1], at 2-72 ("A public way, whether it be a highway, a railroad, or a canal, cannot in the nature of things be constructed for any considerable distance through an inhabited country without crossing other public ways."). Allowing a governmental entity to allege immunity and bar construction of those projects would render the completion of those public projects impossible or entirely dependent on the will of any public entity owning land along the route of a project.[6]

[6]Which would also contravene long-standing Texas law providing that the public entity constructing the project has the discretion to determine the project's route. *See Morello v. Seaway Crude Pipeline Co., LLC,* 585 S.W.3d 1, 13 (Tex. App.—Houston [1st Dist.] 2018, pet. denied.).

In the best-case scenario, it would require unnecessary detours and the acquisition of additional private property—all at an increased cost to the public at large. Accordingly, courts have historically found that general grants of eminent domain authority allow for the crossing of public property, even absent an express legislative declaration to do so. *Humble*, 2 S.W.2d at 1019; *Fort Worth & Western R.R. Co. v. Enbridge*, 298 S.W.3d 392, 394-95 (Tex. App.—Fort Worth 2009, no pet.).

In this case, the Legislature has expressly given District 3 the right to condemn "any land." Because "any land" includes public land, the Legislature has also expressly waived any governmental immunity argument that could be lodged in this case. Nevertheless, District 1 invited the trial court (successfully, so far) to ignore binding Supreme Court authority and the Legislature's clear intent by improperly replacing the word "any" with the word "private." *See Colorado County. v. Staff*, 510 S.W.3d 435, 444 (Tex. 2017) ("When interpreting the Legislature's words, however, [courts] must never 'rewrite the statute under the guise of interpreting it.'") (quoting *In re Ford Motor Co.*, 442 S.W.3d 265, 284 (Tex. 2014)). Such an interpretation would ignore the plain, inclusive language of the statute, and, as discussed below, render other provisions of the Water Code superfluous or meaningless.

Finally, District 1 is a required party to this action in accordance with section 21.012 of the Property Code. Failure to include it in the suit would render any

judgment ineffectual as to its interest in the land at issue in the case. *Lo-Vaca Gathering Company v. Earp*, 487 S.W.2d 789 (Tex. App.—El Paso 1972, no writ). Therefore, even assuming immunity were otherwise applicable, the statutory requirement that District 1 be named in the case expressly waives such immunity. *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697-98 (Tex. 2003) ("[I]f the Legislature requires that the State be joined in a lawsuit for which immunity would otherwise attach, the Legislature has intentionally waived the State's sovereign immunity.").

3. Companion provisions in Chapter 49 confirm clear legislative intent to allow condemnation of public lands

In determining legislative intent, courts also do not confine their review to words, phrases, or clauses in isolation, but rather they examine the entire act to glean its meaning. *Jones v. Fowler*, 969 S.W.2d 429, 432 (Tex. 1998); *see* TEX. GOV'T CODE § 311.011(a) (instructing courts to construe words and phrases in context). When possible, each sentence, phrase, clause, and word is given effect, so that the statute makes sense as a cohesive whole. *Clint Independent School Dist. v. Cash Invs., Inc*., 970 S.W.2d 535, 539 (Tex. 1998). "Courts should not assign a meaning to a provision that would be inconsistent with other provisions of the act." *Id.* Finally, as a general principle, courts avoid construction of a statute that renders any statutory language meaningless or superfluous. *City of Dallas v. TCI West End, Inc*., 463 S.W.3d 53, 57 (Tex. 2015).

A brief review of companion provisions in Chapter 49 clearly demonstrates the fallacy of any interpretation of section 49.222 that would preclude the right to condemn public property. Perhaps no other companion section of Chapter 49 illustrates this point better than neighboring section 49.223(a), which provides as follows:

> COSTS OF RELOCATION OF PROPERTY. (a) In the event that the district or the water supply corporation, ***in the exercise of the power of eminent domain*** or power of relocation or any other power, makes necessary the relocation, raising, lowering, rerouting, or change in grade of or alteration in construction of any road, bridge, highway, railroad, electric transmission line, telegraph, or telephone properties, facilities, or pipelines, all necessary relocations, raising, lowering, rerouting, or change in grade or alteration of construction shall be done at the sole expense of the district or the water supply corporation unless otherwise agreed to in writing. Such relocation shall be accomplished in a timely manner so that the project of the district or the water supply corporation is not delayed.

Id. (emphasis added). In short, section 49.223 requires a water district to pay to relocate or re-route any type of public infrastructure that it may disturb because of its use of eminent domain. However, a water district could not disturb an existing public use in the exercise of its power of eminent domain without the right to use its power of eminent domain to acquire the right to disturb the existing public use.[7]

[7] While some uses described in Section 49.223 could be seen as public in nature but typically owned or operated by private companies (*i.e.* telephone properties), others are unquestionably uses by governmental entities made on governmental land (roads, bridges, highways, facilities, and pipelines).

Accordingly, limiting section 49.222 to only allow for the condemnation of private property would render the statute meaningless and unnecessary.

Conversely, when section 49.222 is properly read to allow for the condemnation of public property, it is easily harmonized with Section 49.223. In fact, these two provisions indicate that the Legislature recognized the fact that public projects will almost inevitably require the crossing of other publicly owned property, allowed for the condemnation of that property when necessary, and provided additional protections for the existing public infrastructure by requiring the condemning entity to bear the costs associated with construction related issues its project might cause to the existing public facility.

Examining additional provisions of Chapter 49 yields the same conclusion. For example, section 49.221(a) provides water districts with the right to enter "any land" in order to perform surveys or tests to determine if the land may be suitable for a proposed project. Under the same statutory framework discussed above, "any land" includes public land. It would be incongruous to believe that a water district could survey a property for a public project but then ultimately be unable to use the power of eminent domain to acquire the surveyed property.

Conclusion

Condemnation suits are *in rem* proceedings. Governmental immunity does not apply to *in rem* proceedings. Strictly in the alternative, assuming for purposes of argument only that governmental immunity might otherwise apply to condemnation proceedings, which District 3 disputes, the Legislature has waived governmental immunity in the case at bar. Chapter 49 of the Water Code leaves no doubt that the Legislature intended to give water districts the right to condemn public land. In doing so, it clearly and unambiguously consented to such suits where the condemnee is another governmental entity. Regardless of whether there is no immunity to begin with, or it has been waived, this Court should therefore reverse the Order of Dismissal and remand the cause for a trial on the merits.

RELIEF REQUESTED

District 3 is seeking a reversal of the trial court's Order of Dismissal and a remand of this cause for a trial on the merits. District 3 is also seeking any other relief to which it may be entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with the type-face and length requirements of TEX. R. APP. P. 9.4(i). Exclusive of the exempted portions stated in rule 9.4(i)(l), the brief contains 5,114 words, as calculated by Microsoft Word 2016, the program used to prepare this document.

/s/ Frank Weathered
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this filing was served on the following counsel of record via the Court's electronic filing system on September 25, 2020:

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APPENDIX

CAUSE NO. CCD-0517-D

HIDALGO COUNTY WATER IMPROVEMENT DISTRICT NO. 3 Condemnor,	§	EMINENT DOMAIN PROCEEDING
V.	§	IN THE COUNTY COURT AT LAW NO. 4
HIDALGO COUNTY IRRIGATION DISTRICT NO. 1 Condemnee.	§	HIDALGO COUNTY, TEXAS

ORDER GRANTING HIDALGO COUNTY IRRIGATION DISTRICT NO. 1'S PLEA TO THE JURISDICTION

BE IT REMEMBERED that on July 20, 2020, came to be heard Condemnee Hidalgo County Irrigation District No. 1's Plea to the Jurisdiction. The Court, having considered Condemnee's Plea to the Jurisdiction, all responses and replies thereto, the pleadings and evidence, the arguments of counsel, and all other matters properly before it, the Court is of the opinion that said Plea to the Jurisdiction should be GRANTED and that this condemnation proceeding should be dismissed for lack of subject matter jurisdiction.

IT IS THEREFORE, ORDERED, ADJUDGED and DECREED that Condemnee Hidalgo County Irrigation District No. 1's Plea to the Jurisdiction be GRANTED;

IT IS FURTHER ORDERED, ADJUDGED and DECREED that all claims asserted by Hidalgo County Water Improvement District No. 3 in the above-entitled and numbered cause are hereby DISMISSED for lack of subject matter jurisdiction.

All relief not expressly granted herein is hereby DENIED. The clerk shall send a copy of this Order to counsel for the parties.

SIGNED this 3rd day of August, 2020.

JUDGE PRESIDING

TAB A

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TAB A

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

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